LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-5831

JAMES H. McCONNELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

ALVIN M. BINDER
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Introductory Statement	1
Jurisdictional Statement	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
Argument	10
Conclusion	22
Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit	A-1
Appendix B—Order Denying Petition for Rehearing	A-5
Appendix C—Order of Commitment	A-6
Appendix D—Opinion of the United States Court of Appeals for the Fifth Circuit in United States v. Byrd	A-8
Appendix E—Order on Petition for Rehearing in United States v. Byrd	A-18

Cases Cited

Alexander v. United States, 390 F.2d 101 (5th Cir. 1968)	18
Almeida-Sanchez v. United States, 93 S.Ct. 2535, 37 L.Ed. 2d 596 (1973)	7, 8, 10, 13
Cash v. Williams, 455 F.2d 1227 (9th Cir. 1972)	11
Davis v. United States, C.A.N.M. 1965, 347 F.2d 378	21
Gregg v. United States, 394 U.S. 489, 22 L.Ed.2d 442, 89 S.Ct. 1134 (1969)	17

Herman v. United States, 289 F.2d 362 (5th Cir. 1961) .. 18

Jones v. United States, 80 S.Ct. 725, 362 U.S. 257, 4 L.Ed.2d 697, 78 ALR2d 233 (1960) 10, 12

Lovette v. United States, 230 F.2d 263 (5th Cir. 1956) ... 11

Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1092, 81 S.Ct. 1684 20
Marsh v. United States, 344 F.2d 317 (5th Cir. 1965) ...8, 10
Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) 18
Morgan v. State, 142 So.2d 308 (Fla. 1962) 16

Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970) 21

United States v. Bursey, 491 F.2d 531 (5th Cir. 1974) ... 8
United States v. Byrd, 483 F.2d 1196 (1973) 4, 5, 7, 8, 9
United States v. Chapman, D.C. Va. 1971, 321 F. Supp. 767 21
United States v. Hughes, 325 F.2d 789 (2nd Cir. 1964) .. 20
United States v. Lee Wan Nam, 247 F.2d 863 (1960) ... 12
United States v. Marder, 474 F.2d 1192 (5th Cir. 1973) .. 14
United States v. Miller, 492 F.2d 37 (1974) 8, 9
United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966) .. 14
United States v. Storm, 480 F.2d 701 (5th Cir. 1973) 8
United States v. Tane, 329 F.2d 848 (2nd Cir. 1964) ... 13

Weed v. United States, 340 F.2d 827 (10th Cir. 1965) ..11, 19
Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949) 15
Wong Sun v. United States, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963) 14

Statutes

28 USC 455 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

JAMES H. McCONNELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

INTRODUCTORY STATEMENT

The Petitioner, James H. McConnell, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, unofficially reported as *United States v. McConnell*, — F.2d — (5th Cir., 1974), handed down by the United States Court of Appeals for the Fifth Circuit on October 15, 1974.

The Opinion of the United States Court of Appeals for the Fifth Circuit is appended, bound with this Petition, and marked Appendix "A".

Petition for Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on October 15, 1974, and the Order denying the Petition for Rehearing is appended, bound with this Petition, and marked Appendix "B".

By Order of the United States District Court, Southern District of Texas, Laredo Division, on November 1, 1974, Petitioner was directed to the custody of the United States Marshal for execution of sentence, and at the present time Petitioner is in the custody of the United States Marshal and/or appropriate custodial authorities of the United States Government. The Order of Commitment is appended, bound with this Petition, and marked Appendix "C".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit and Order of said Court denying the Petition for Rehearing dated October 15, 1974.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not Petitioner's Fourth Amendment rights under the United States Constitution were abrogated through a warrantless search of an automobile which Petitioner had leased and which was, at the time of said illegal search, in possession of another party.

(2) Whether or not Petitioner has standing to object to a previously adjudicated illegal search and seizure, and by virtue thereof the correctness *vel non* of the lower Court's admission of evidence against Petitioner garnered through an illegal search and seizure.

(3) Whether or not conduct on the part of the trial Court judge and the Government in obtaining evidence used against Petitioner constitutes the denial of Petitioner's Constitutional right to due process of law.

(4) Whether or not the proof and evidence against Petitioner is sufficient to support a conviction of unlawful importation of a controlled substance.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and the Fifth Amendment to the Constitution of the United States.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner was indicted for unlawful possession with intent to distribute marijuana, a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); aiding and abetting possession with intent to distribute three hundred pounds of marijuana in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2(a); and importation of a controlled substance in violation of Title 21, United States Code, Section 952(a) and 960(a)(1), and Title 18, United States Code, Section 2(a).

On November 28, 1973, the United States District Court for the Southern District of Texas, Laredo Division, heard testimony regarding Petitioner's Motion to Suppress and on November 30, 1973, Petitioner filed an amplified Motion to Suppress Evidence and to dismiss the indictment based on new facts adduced at said pre-trial hearing. The Court thereafter carried such Motions and testimony on the Motions throughout the trial. On November 30, 1973, Petitioner filed a Motion for the trial judge to recuse himself as a necessary witness. This Motion was denied on December 3, 1973, and Petitioner was tried by the Court sitting without a jury.

Richard Glenn Byrd, previously convicted co-conspirator, was arrested on May 9, 1972, at 1:30 A.M. driving northeast on Highway 59 toward Freer, Texas. *United States v. Byrd*, 483

F.2d 1196 (5th Cir., 1973), correctly states the facts of the search of the vehicle driven by Byrd and seizure of evidence introduced against Byrd and Petitioner.

The vehicle driven by Byrd was stopped 45 miles from the Mexican border, without warrant and without prior notice to the Immigration officers of the probability that a crime had occurred, to ascertain whether the vehicle carried aliens. It was ascertained by the officers that Byrd was a United States citizen. One of the officers then inserted himself through the window of the vehicle and inspected the rear seat to determine if Byrd was importing illegal aliens into the country. At the time the officer had the upper half of his body inside the automobile, he detected the odor of marijuana emanating from the vehicle. Byrd reluctantly gave a trunk key to the officer. The trunk of the automobile was opened and the contraband was discovered. A Texaco credit card issued to Petitioner was also found in the automobile and confiscated.

Subsequent to Byrd's conviction and prior to sentence, Byrd called his attorneys and was concerned about discussions that took place between him and Dan Beto, a United States Probation Officer. Attorneys for Byrd and Petitioner were informed by the Assistant United States Attorney that nothing presented to the sentencing judge by way of pre-sentence report on Byrd would be utilized by him in the future as to Petitioner. One of the attorneys for Byrd and Petitioner called Beto wanting to know what Beto was doing to Byrd. Beto advised attorney Caswell that he wanted more information out of Byrd. Byrd was then advised by Caswell to cooperate in order to obtain a favorable presentence report. Byrd's attorneys advised Byrd on more than one occasion that if he desired to plead guilty prior to trial and become a Government witness, he would possibly receive some benefit therefrom and that if he desired to testify a conflict of interest would arise and they would obtain a new attorney for Petitioner.

Unknown to attorneys representing Byrd and Petitioner, the Court received a pre-sentence report from Beto indicating that Petitioner was involved and at this time and place the Court felt that Byrd had been inadequately represented and that there was a possible conflict of interest between Byrd and Petitioner. The Court then, without notice to Petitioner's attorneys, directed Beto to interview Byrd and inform him that he (Byrd) should carefully examine his situation and indicate whether or not it might not be to his own best interest to obtain new counsel to represent him. Byrd was interviewed and Beto indicated to Byrd that appeals were seldom granted and that he (Byrd) was not getting proper legal representation. Beto also offered Byrd, subsequent to conviction, new counsel at Government expense. Byrd then attempted to reach his attorneys indicating to one of them that the Government was "playing with his mind". Shortly thereafter, Byrd approached Beto requesting the giving of a statement. Beto reported this to the trial and sentencing judge. The judge then called Laredo, Texas, and set up the appointment for Byrd's statement. Beto informed Byrd of the time and place to report for giving the statement. Byrd traveled to Laredo, Texas, on a Sunday, met with agent Max Pouley of United States Customs, and on May 28, 1973, gave a statement implicating Petitioner and others. Byrd traveled to Houston and sought out Beto a third time the following day to confirm to Beto that he (Byrd) had, in fact, made a statement as desired by Beto, intending that this information be given to the sentencing judge in an attempt to mitigate the already imposed sentence. Byrd testified that in his conversations with Beto, Beto was predominantly interested in investigating the case further, and not Byrd's background—another probation officer accomplished Byrd's background information—that Beto had further enlarged on the Court's directions and indicated that he (Byrd) would be lucky to get off with a ten-year sentence. Byrd further characterized Beto as an investigator, and under this coercion by Beto, delivered the statement implicating Petitioner.

On appeal to the United States Court of Appeals for the Fifth Circuit, the conviction of Richard Glenn Byrd was reversed, *United States v. Richard Glenn Byrd*, 43 F.2d 1196 (5th Cir., 1973). The Fifth Circuit held that on the basis of *Almedia-Sanchez v. United States*, 93 Sup. Ct. 2535, 37 L. ed. 2d 596 (1973), the search of the vehicle driven by Byrd was illegal and all evidence obtained thereby was inadmissible and any criminal proceedings against Richard Glenn Byrd was a nullity.

On trial in the District Court, the prosecution called Hertz representatives from Houston and Jackson who placed before the Court the lease agreement whereby Petitioner leased two vehicles on behalf of co-conspirators Byrd and Price. The lease agreements pertaining to both vehicles were introduced, indicating Petitioner's possessory interest. By stipulation, the Texaco credit card belonging to Petitioner and found in the vehicle driven by Byrd was also introduced into evidence. A Texaco employee presented evidence of the charges to Petitioner's credit card pertaining to co-conspirator Price. Escobedo, the border officer, testified essentially to the same facts and circumstances as to Byrd's arrest that he testified to on September 28, 1973. Co-conspirators Price and Webb testified essentially that they had made similar trips to those discovered in the Byrd arrest pursuant to transportation directions of Petitioner. No evidence of contraband was introduced pertaining to these trips. No testimony was given on importation or that marijuana came into the United States unlawfully.

Petitioner has asserted throughout these criminal proceedings that the search complained of was without warrant or probable cause, was not incident to an arrest, and did not fit into the exception of the warrant requirement, and therefore, unconstitutional. Petitioner further continuously asserted his possessory interest in the vehicle driven by Byrd, his standing to complain of the illegal arrest, and that all physical evidence and oral evidence obtained therefrom could not be utilized by the Government as it was "fruit of the poisonous tree".

REASONS FOR GRANTING THE WRIT

We believe that this case furnishes the Court two distinct and important issues which have imposed insurmountable confusion in the lower federal courts regarding the issues raised by this Court in *Almeida-Sanchez v. United States*, supra, and a much needed ruling on the status of leasehold interest concerning property which is the subject of a search. The search here is the same search considered by the Fifth Circuit Court of Appeals in *United States v. Byrd*, supra, which was initially decided September 7, 1973, subsequent to *Almeida-Sanchez*, supra, which was decided June 21, 1973. (See Appendix D).

The search here and in Byrd was ruled unconstitutional by reason of *Almeida-Sanchez* and *United States v. Storm*, 480 F. 2d 701 (5th Cir. 1973); *Marsh v. United States*, 344 F.2d 317 (5th Cir. 1965), and *United States v. Bursey*, 491 F.2d 531 (5th Cir. 1974).

On Petition for Rehearing, May 28, 1974, the Fifth Circuit Court of Appeals ruled that *Almeida-Sanchez* would be given only prospective application, abandoned reliance upon this authority and sustained the prior reversal of Byrd on Marsh, etc., supra. (See Appendix E).

The Lower Court here had foreguidance on December 3, 1973, *Almeida-Sanchez* and *Byrd*, supra.

In the interim period the Fifth Circuit Court of Appeals decided *United States v. Miller*, 492 F.2d 37 (1974), which held that *Almeida-Sanchez*, supra, should be given only prospective application. The search in question under either of the two theories of law is undoubtedly an illegal search and seizure. Whether the Supreme Court desired that it have only prospective application is an unsettled issue. Does prospective application apply to a search prior in time to the Supreme Court's

decision ruling same illegal where the cause has not been fully heard through appellate tribunals? Does *Almeida-Sanchez* hold that where a search commenced prior in time to the decision but where a defendant is tried subsequent to the ruling, prospective application of the ruling that the search is illegal and unconstitutional prohibits Petitioner McConnell from urging same? Does not the lessee of an automobile who pays the rental thereon have sufficient possessory interest to object to an illegal search and seizure where an agent of lessee has physical custody of the vehicle at the time of search?

The confusion below in the Fifth Circuit Court of Appeals regarding *Byrd* and *Miller*, supra, together with the fact that Byrd is now before the Fifth Circuit Court of Appeals for another Petition for Rehearing En Banc provides this Court with the opportunity in this case (where the identical same factual situation is presented) to establish the necessary guidelines to avoid a multiplicity of more litigation in appeals of this nature.

This case further provides the Court the clear cut opportunity to establish the necessary guidelines on lower trial courts in the utilization of a pre-sentence report to further pursue a co-defendant represented by identical counsel by the judiciary fostering further investigation by and through a probation officer against an accused.

ARGUMENT

The accused by and through his counsel properly protected the record below in making the necessary legal motions to suppress evidence obtained in the search of accused's vehicle driven by Byrd. The record indicates the search of this vehicle was not made pursuant to warrant nor to the probability that a crime had occurred or was about to occur and the facts concerning the search fall within the purview of *Almeida-Sanchez*, supra.

In any event the Fifth Circuit Court of Appeals indicated once and for all that either based on *Almeida-Sanchez*, supra, and/or *Marsh*, supra, the search was illegal. The issue today is moot. The knowledge that the search was considered illegal was known to the trial court prior to trial, during trial and subsequent thereto where an extensive brief was furnished the lower court before it rendered its opinion. The lower court in its opinion alluded to the fact that Petitioner had standing to object since he could be considered a lessee of the vehicle. The lease was introduced into the record with Petitioner's name inserted where the lessee is to be inserted and the record shows Petitioner paid for the consideration for the lease.

The arrest of Byrd and the facts flowing therefrom as to this Petitioner are co-related and interdependent one upon the other. The personal and possessory interest attached and accrued to Petitioner simultaneously with the hiring of the vehicle. Petitioner paid for the gas which enabled the vehicle to operate. The issue as to whether Petitioner had to be the actual driver of the vehicle is settled in *Jones v. United States*, 80 S.Ct. 725 at 731, 362 U.S. 257 at 261, 4 L.Ed. 2d 697, 78 ALR2d 233 (1960) which held:

> "To establish 'standing', courts of appeals have generally required that the movant (for suppression of illegally

> seized evidence) claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

"A substantial possessory interest" is precisely the interest of Petitioner as lessee. He had the right to possession by contract with the lessor Hertz, and we contend that driver presence is not a criterion for possessory interest. The Ninth Circuit has ruled on this point where the owner of an automobile allowed an unlicensed operator to utilize the vehicle and where search followed:

> "We cannot agree with this contention. In order to establish standing to contest a search, a defendant must show that he owned or possessed the seized property *or* that he had a possessory interest in or was present at the premises searched. An additional consideration arises from the fact that when the crime charged is one of possession, a defendant will not be forced to sacrifice his Fifth Amendment rights in order to assert his Fourth Amendment rights. (Citations omitted). We conclude that appellant's ownership of the automobile conferred standing upon him to challenge the validity of the search and the admissibility of the evidence seized." *Cash v. Williams*, 455 F.2d 1227 at 1229-1230 (9th Cir. 1972).

We further cite *Weed v. United States*, 340 F.2d 827 (1965) which holds:

> "Defendant who claimed possessory interest in automobile which he had rented and who stated at time of his arrest that it was his, had standing to object to search without warrant of automobile in which firearms were found, although defendant did not claim possessory or proprietary interest in the firearms." (p. 827).

Lastly, the Fifth Circuit Court of Appeals has previously ruled in accordance with Petitioner's contentions. See *Lovette v. United States*, 230 F.2d 263 (5th Cir. 1956):

> "Of the first ruling, that defendant, having disclaimed interest in, or possession of, the premises searched and the property seized, could not be heard to invoke the personal privilege of the Fourth Amendment, it is sufficient to say that no point of law is more firmly settled than the guarantee of the Fourth Amendment against unreasonable searches and seizures is personal and can be raised only by one who, at the least, claims ownership or possession of, *or connection with the premises searched or the property seized*. The cases so holding are legion." (Emphasis added) p. 263.

The Ninth Circuit further recognizes Petitioner's contention in *Jones v. United States* supra, wherein it stated:

> "(That case) modified this rule to include in the class of an 'aggrieved person' not only one against whom the search was directed or had a traditional property interest in the thing seized or searched, or was legally present on the searched premises but also one who is being charged with either actual or constructive possession of the seized property. Sandejas v. U.S., 428 F.2d 1040 at 1043 (9th Cir. 1970)."

The Petitioner's standing is further substantiated by the Second Circuit in *United States v. Lee Wan Nam*, 274 F.2d 863 at 865 (1960):

> "The victim of an illegal search and seizure has been consistently defined as one who either has a *right to possession of the premises* searched or has a possessory interest in the property seized." (Emphasis added).

The next issue which we ask the Court to rule upon is the exploitation of victims of an illegal search and seizure which ultimately provides the necessary evidence to further a prosecution. The identity of other witnesses produced through exploitation by the government of an illegal act has been con-

demned. A case in point is *United States v. Tane*, 329 F.2d 848 (2nd Cir. 1964), which stated:

> "Indeed the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wire tap, and that Pase was unwilling to testify or even admit to making any unlawful payments until he was told by the assistant district attorney that the conversation between his attorneys and the union officials had been tapped. *The road from the tap to the testimony may be long, but it is straight.*" p. 853 (Emphasis added)

The lower court, knowing that Byrd had knowledge of Petitioner, insidiously proceeded to work on Byrd through a probation officer after the lower court had found him guilty and while both Byrd and Petitioner were represented by the same counsel, thus in effect depriving Petitioner of counsel. Byrd was advised by Petitioner's and his counsel that he would prevail in his appeal to the Fifth Circuit Court of Appeals due to *Almeida-Sanchez*, supra, while on the other hand the Government continued to advise Byrd out of the presence of his counsel that he would receive a heavy penitentiary sentence. The coercion was accomplished with sophistication, with the knowledge of the trial court, and it achieved the desired results with Byrd ultimately giving a statement to Customs which gave to the Government two other witnesses who by their testimony assisted the Government and received sentences with probationary terms while Petitioner was sentenced to ten years confinement.

We have in this series of incidents and legalities three defendants escaping incarceration with the same guilt attached to each and with the Petitioner entering the penitentiary for confinement on November 8, 1974, the date of this writing. It would be difficult in the absence of attenuation for the Government to argue that the chain of events leading from the search

of McConnell's vehicle driven by Byrd did not culminate with the arrest and conviction of Petitioner. Statements derived by illegal searches and seizures have always been regarded as fruit of the poisonous tree and statements of witnesses coerced by threats of severe punishment depriving them of their free will have heretofore been deemed inadmissible. We cite the case of *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973):

> "Proof that the witness would have come forward by his own volition, regardless of his identification by the illegal search, would be extremely relevant to a determination of attentuation. United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967)." p. 1196.

We further cite *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966), which excluded an incriminating statement by the driver of an automobile because such statement was triggered by an illegal search of that automobile, such statements being regarded as fruit of the poisonous tree and inadmissible.

The pervasiveness of the taint of illegality did not end because the enforcement officials sought an alternate method which is not divorced from the original illegality. We do not contend that the exclusionary rule is a blanket disclaimer. This Court has ruled on this point in *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

However, the evidence obtained in the Lower Court emanated in a continuous stream from one single source, the unlawful search of McConnell's vehicle driven by Byrd. The Government, in the record, made no contention that there was any independent investigation which resulted in Petitioner's second arrest. The record reveals, on pre-trial hearing on motions to suppress in the Judge's Chambers, that the Judge himself set in motion a chain of events with a probation officer named Beto wherein Beto enlarged upon the directions of the Judge and acting as an arm of the Court, out of the presence

of Petitioner's and Byrd's counsel, undermined Byrd's confidence in his attorneys and who, under coercion, made a statement leading to the arrest and conviction of Petitioner. A reading of the record indicates that but for the original illegal search and seizure such statement would not have been made and should have been suppressed and the failure of the Lower Court to recuse himself upon motion being properly made as to being a material witness in the case was prejudicial error. We have here a Lower Court Judge who, prior to trial, was intimately acquainted with each facet of the Byrd case, had actually sat in judgment upon Byrd, and who, prior to the first day of the trial, knew of the Petitioner's involvement as he had the probation officer report back to him the results of the probation officer's success in undermining Byrd. The Judge himself set up the appointment with Customs in Laredo, Texas, for Byrd to give his statement involving McConnell. The Lower Court's knowledge of the case through a pre-sentence report regarding one defendant, while represented by identical counsel of the second defendant, McConnell, gave information to the Judge which was inherently unfair to Petitioner and deprived him of his rights of an evidentiary hearing as opposed to the facts contained in a pre-sentence report with all hearsay involved. The same Judge sat in Petitioner's case without jury. See *Williams v. New York*, 337 U.S. 241-253, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), wherein the Court stated:

> "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial

> of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to that narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment *after the issue of guilt has been determined.*" (Emphasis added.)

The pre-sentence report is a vehicle to fully inform the judiciary with emphasis directed to the needs of a particular defendant and the proper punishment which would flow therefrom after a consideration of the report. We contend it was never the intention that a pre-sentence report be utilized by the United States Government through the judiciary to prosecute another subject where the same Judge would sit in judgment on this subject. The philosophy underlying pre-sentence reports is succinctly stated in a state decision in *Morgan v. State*, 142 So.2d 308 (Fla. 1962):

> "A sentencing judge is concerned with the human equation, which comprises broadly defined considerations; conversely, rules of trial evidence and procedure circumscribe within a limited and defined scope the factors which may be deemed pertinent to the guilt or innocence of an accused as to some specific offense. The subject of a trial is a defendant, or one who is resisting the charge against him. When the time of sentencing arrives, this role has changed and he, instead, is one already convicted, either by his own admission or by the evidence notwithstanding his defense. Through the pre-sentence investigation uninhibited truths may be gleaned which might or could aid him; and the scrutiny of the investigation report by the judge is for the purpose separate and apart from the purpose of a trial. * * * These are not things which lend themselves to the restrictions of trial procedure and the rules of evidence."

The Lower Court Judge ordering his probation officer to inquire into the propriety of Byrd being represented by Petitioner's counsel without calling in the counsel, left at this point in time and place McConnell without counsel. The affidavits and testimony of Petitioner's counsel is in the record and this Court could adequately grant certiorari in the interest of justice on the testimony and issues and implications presented without the necessity of further argument by counsel here. The presentence report and the inquiry resulting therefrom gave to the Lower Court factual knowledge which we feel prior to trial is prohibited. See *Gregg v. United States*, 394 U.S. 489, at 492, 22 L.Ed.2d 442, 89 S.Ct. 1134 (1969), wherein the Court stated:

> "Submission of the report to the Court before (the determination of guilt) constitutes error of the clearest kind."

The record in this case substantiates a premature presentation to the Trial Court of facts which might have influenced determination of the guilt of McConnell. The knowledge of the Trial Court which was unknown to Petitioner prior to the hearing on motion to suppress and his bearing as a witness is substantiated without question in the record. The probation officer, after receiving directions of the Lower Court, made a promise of reward to Byrd in that he would receive a lesser sentence than had been previously imposed upon him by the Lower Court. When Byrd and McConnell's counsel objected to the harassment Byrd was receiving by the probation officer, this same Federal officer responded, "We would like to get some more information out of him." Byrd testified that this conduct frightened him. The record is replete and uncontradicted that the Lower Court Judge initiated the probation officer's continued investigation with this officer enlarging upon the court's direction and that these facts resulted in McConnell's indictment. Byrd's testimony in the record says it all:

> "And he then told me that he believed that the counsel that I had defending me was not worried about my welfare; that they were more worried about the person or people, whoever was paying them. They were worried about their welfare and that I would be lucky if I got a minimum of ten years. Mr. Beto said that if I would make a statement to customs, if I had told them more than I had told them, that he would try to grant, see it wasn't in his power, but to talk to the Judge, and see maybe if I could get a lighter sentence, and make it light on myself. In other words, he wanted me to spill the beans."

Beto's activities were initiated by the Bench and he acted as an arm of the Court and Petitioner was the victim of these illegal actions. The Fifth Circuit Court of Appeals has condemned this type activity. We cite *Herman v. United States*, 289 F.2d 362 (5th Cir. 1961), at page 365:

> "A trial judge should never assume the role of prosecuting attorney and *lend the weight of his great influence to the side of the government.*" (Emphasis added.)

The secret interview out of the presence of Byrd's and Petitioner's attorneys which has further been condemned in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) at page 205:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crimes."

The Fifth Circuit has further held on the matter of voluntary consent in *Alexander v. United States*, 390 F.2d 101 (5th Cir. 1968) at page 110:

> "Intimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be

devoid of mendacity. We do not hesitate to undo fraudulently induced contracts. Are the disabilities here less maleficient? In a case which deals with a quite similar issue of police camouflage, the Second Circuit concluded with the following words:

'Although the line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw, we are persuaded that on the record before us there has not been a sufficient showing of true consent, free from chicanery or compulsion. To hold otherwise in these circumstances would, as the late Justice Jackson once eloquently remarked, "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law," Johnson v. United States, 333 U.S. 10, 17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). The civilized standards of fundamental fairness developed over the years in this area must be zealously guarded by the trial and appellate courts if the guarantees of the Bill of Rights are to be kept meaningful and not permitted to evaporate through silent abrogation.' United States v. Como, 2 Cir. 1965, 340 F.2d 891, 894-895."

The probation officer and Byrd had an agreement that Beto would report to the Judge that the favorable statement had been made and once again the possible modification of his sentence was the overriding influence which produced the statement involving McConnell. We say that this type activity is condemned in *Weed v. United States*, 340 F.2d 827 (10th Cir. 1965) at page 829 where the Court held:

"Particular words of consent must always be weighed in light of the atmosphere and totality of circumstances in which they are spoken in order to determine the intent and voluntariness of the words."

The issue of Petitioner's guilt is not an issue here for we rely on *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1092, 81 S.Ct. 1684, where this Court has stated:

> "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine, 'the criminal is to go free because the constable has blundered.' People v. Defore, 242 NY, at 21, 150 NE at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, 'there is another consideration—the imperative of judicial integrity.' 365 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

We are, therefore, obliged to argue that the Fifth Circuit established the primary illegality of the search and seizure and the continuing exploitation of that primary illegal act resulted in the conviction of Petitioner McConnell. We say that but for the original search and seizure and the acts emanating therefrom, McConnell would have never been involved whatsoever.

We further state that when the Lower Court Judge chose to testify and offered himself for cross-examination on the pretrial hearing on November 28, 1973, then by his own act he became a witness in the case and was totally and absolutely disqualified to sit in judgment on the accused. We rely on 28 USC 455 which states:

> "Any justice or judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness . . ."

See further *United States v. Hughes*, 325 F.2d 789 (2nd Cir. 1964), where the disqualification is required if the Judge is a

witness. See further *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970), where we find the following:

> "It has long been recognized under similar circumstances that a judge cannot serve as a material witness as well as the trier of fact. (Citations)
>
> " 'Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded as partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair advantage by admitting the presiding judge as a witness is very obvious.' "

There is no evidence of record reflecting that contraband was unlawfully imported or brought into the United States and yet this accused was convicted of smuggling. See *Davis v. United States*, C.A.N.M. 1965, 347 F.2d 378. See also *United States v. Chapman*, D.C. Va. 1971, 321 F.Supp. 767.

The requirements and evidence necessary for proof of smuggling was not mentioned in the Lower Court's decision. No mention was made by the Fifth Circuit Court of Appeals regarding these contentions and with the absence of such proof of the elements of smuggling, the Petitioner's conviction is deserving of certiorari.

CONCLUSION

Petitioner respectfully submits that a review of the record and the appendices attached hereto would indicate that this Petition for Writ of Certiorari should be granted, and the judgment of the Lower Court and the Fifth Circuit Court of Appeals which affirmed the judgment of the Lower Court should be set aside and the judgments of conviction reversed.

Respectfully submitted

ALVIN M. BINDER
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
Attorney for Petitioner